

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
CIRCUIT COURT FOR THE ELEVENTH JUDICIAL DISTRICT

William P. Keesley, Chief Administrative Judge

Appellate Case No. 2015-000348

Wilma Spikes Respondent,

v.

Roy Steven Cunningham and Roy Chester Cunningham Appellants.

INITIAL BRIEF OF APPELLANTS

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err in finding and ruling as a matter of law that the property transfer from Steve Cunningham to Roy C. Cunningham was made to defraud Respondent?
2. Did the Trial Court err in finding and ruling as a matter of law that the transfer from Steve Cunningham to Roy C. Cunningham was made without valuable consideration?
3. Did Respondent fail to present any evidence of Roy C. Cunningham's participation in any alleged property transfer to defraud Respondent?
4. Did Respondent fail to present any evidence as to Appellant Steve Cunningham's ability to satisfy her judgment against him?

STATEMENT OF THE CASE

This is an appeal from an order of the Lexington County Court of Common Pleas applying the Statute of Elizabeth to set aside a real estate conveyance from Roy Steven Cunningham to his father, Roy Chester Cunningham, Jr., on or about December 25, 2010. (Plaintiff's Exhibit 3; Order of Judge Keesley; R. ____). Judge Keesley entered his Order in this case on January 29, 2015. (Order of Judge Keesley; R. ____).

Respondent Wilma Spikes initiated this action against the Appellants with the filing of the Summons and Complaint on or about April 4, 2013 and the Lis Pendens approximately one year later. (Summons and Complaint; Lis Pendens; R. ____). Respondent's Complaint seeks to set aside a transfer of property located at 112 Harmon Creek Drive, Lexington, South Carolina ("the property"), by Appellant Roy Steven Cunningham to Appellant Roy Chester Cunningham, Jr., on or about December 25, 2010. (Plaintiff's Exhibit 3; Complaint; R. ____). Appellants timely answered Respondent's Complaint. (Answer and Counterclaim; R. ____). Appellants' Answer asserted numerous defenses and also counterclaimed against Respondent for slander of title. (Answer and Counterclaim; R. ____). Respondent timely filed her Reply. (Reply; R. ____).

This matter was tried non jury by the Honorable William P. Keesley, Presiding Judge on September 29, 2014. (Transcript of Record; R. ____). At the close of all of the evidence, Appellants voluntarily dismissed their counterclaims against Respondent. (Transcript of Record, p. ____, ll. ____; R. ____). On January 29, 2014, Judge Keesley issued his final order granting the Respondent the relief requested in her complaint.

(Order of Judge Keesley; R. ____). This appeal timely followed. (Notice of Appeal; R. ____).

STATEMENT OF THE FACTS

Appellants Roy Chester Cunningham, (referred to on the deed at issue in this case as Roy Chester Cunningham, Jr.) and Roy Steven Cunningham are father/son. (Transcript of Record, p. 7, ll. 10-18; R. ____). Roy Chester Cunningham (“Roy Cunningham”) is approximately seventy-two (72) years old. (Transcript of Record, p. 18, ll. 13-15; R. ____). He is retired from Delta and presently works for AA Heating and Air. (Transcript of Record, p. 18, ll. 21-24; R. ____). His son, Roy Steven Cunningham (“Steve Cunningham”) is the owner of a business, Calypso Pools. (Transcript of Record, p. 6, ll. 22-25; R. ____).

Mr. Roy Cunningham was the owner of a parcel of real property located in Lexington County, South Carolina. He purchased this property sometime in the mid 1980's. (Transcript of Record, p. 19, ll. 6-12; R. ____). He testified at trial that he obtained it from his father, Roy C. Cunningham, Sr., who had owned it for approximately ten (10) years. (Transcript of Record, p. 19, ll. 12-25; R. ____). The property has a double-wide mobile home as well as several other structures on it. (Transcript of Record, p. 19, l. 25 – p. 26, l. 3; R. ____).

In 1997, Mr. Roy Cunningham divided the property among his three children, Steve Cunningham, Kim Cunningham and Shawn Cunningham. (Transcript of Record, p. 20, ll. 11-21; Order of Judge Keesley; R. ____). He continued to live on one of the parcels. (Transcript of Record, p. 21, ll. 14-15; R. ____). Two of his children live on their parcels. (Transcript of Record, p. 21, ll. 16-18; R. ____).

Mr. Roy Cunningham's children did not pay him anything for the property. (Transcript of Record, p. 21, ll. 6-8; p. 34, ll. 15-18; p. 35, ll. 16-18; R. ____). Mr. Roy Cunningham testified that he divided the property as "family property" with the understanding that, "when I transferred it to them, I told all three of them that the property was family property. If anything happened, they wasn't able to sell it. If they moved off, it was to go back into the family." (Transcript of Record, p. 23, ll. 3-10; Order of Judge Keesley; R. ____). Steve Cunningham testified that each of the children took the property with the understanding that, "...it was never to be sold. It was always to remain family land." (Transcript of Record, p. 35, ll. 19-24; Order of Judge Keesley; R. ____).

Sometime after this transfer, Steve Cunningham and his sister Kim switched properties. (Transcript of Record, p. 20, l. 22 – p. 23, l. 5; p. 34, ll. 23-24; R. ____). Steve Cunningham did not pay his sister any money as a result of this transaction. (Transcript of Record, p. 34, l. 25 – p. 35, l. 2; R. ____). Steve Cunningham lived on the property. (Transcript of Record, p. 35, ll. 7-9; R. ____). In 2007, Steve Cunningham moved off the property. (Transcript of Record, p. 36, ll. 2-10; R. ____). He informed his father that he was no longer going to live on his parcel. (Transcript of Record, p. 23, ll. 16-19; p. 36, ll. 11-13; R. ____). Mr. Roy Cunningham informed his son that he wanted his property back because he wanted it to remain in the family. (Transcript of Record, p. 23, l. 16 – p. 24, l. 1; p. 36, ll. 14-18; R. ____). Mr. Roy Cunningham testified that this request was part of the longstanding condition that he imposed on his children when he gave them the property originally and not part of any plan, effort, or scheme to defraud any creditors. (Transcript of Record, p. 24, ll. 7-12; p. 28, ll. 8-17; R. ____). Steve Cunningham deeded

the property back to his father on December 25, 2009, when he realized it was still in his name.¹ (Transcript of Record p. 37, ll. 20-22; p. 38, ll. 1-6; R. ____). He testified on direct examination that he did so because of the agreement with his father made at the time of transfer of title to him. (Transcript of Record, p. 38, ll. 6; R. ____).

Respondent brought this action against Appellants in September of 2010 seeking to set aside this transfer. (Plaintiff's Exhibit 1; Transcript of Record, p. 5, ll. 2-14; Complaint; R. ____). At some point in time prior to that, Respondent obtained a judgment against Appellant Steve Cunningham and Calypso Pools. (Transcript of Record, p. 8, ll. 8-9; R. ____). She testified at trial that this judgment has not yet been paid. (Transcript of Record, p. 8, ll. 10-12; R. ____).

STANDARD OF REVIEW

A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth. *Windsor Props., Inc., v. Dolphin Head Constr. Co.*, 331 S.C. 466, 471, 498 S.E.2d 858, 860 (1998). An action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a de novo standard of review applies. *Future Group II, et. al. v. Nationsbank*, 324 S.C. 89, 478 S.E.2d 45 (1996). The Court may review the entire record and determine facts in accordance with its own view as to the preponderance of the evidence. *Durham v. Blanchard*, 313 S.C. 432, 438 S.E.2d 259 (Ct. App. 1993).

¹ Steve Cunningham testified at trial that the return of the property to his father was complicated and delayed by a swap of parcels in the family property with his sister, and by legal mistakes made during this transaction. (Transcript of Record, p. 35, l. 10 – p. 37, l. 14; p. 39, l. 12 – p. 42, l. 25, R. ____).

LEGAL ARGUMENTS

I. The Trial Court Erred in Finding that the Transfer of Property from Roy Steven Cunningham to Roy Chester Cunningham was Made to Defraud Creditors.

The Trial Court's Order contains a handwritten finding of fact, number 24, to the effect that, "the conflicting reasons given by Steven as the basis of the transfer make that testimony not credible. The transfer was made to defraud creditors." This finding of fact is not supported by the evidence presented before the Court, ignores the evidence presented to the Court and is clearly erroneous.

The Court's Order (and specifically this finding) ignore the cumulative testimony given not only by Steve Cunningham, but also by his father Roy Cunningham. Both Roy Cunningham and Steve Cunningham testified that this property had been in the family for a long period of time. (Transcript of Record, p. 19, ll. 6-25; R. ____). It was considered by both of them and by the entire family as "family property" that was to remain in the family. It was the intent of Roy Cunningham that this property remain in the family and he divided it among his children with this intention. In order to assure that this occurred, it was given by Roy Cunningham to his children with the stipulation, which they understood, that it was their property as long as they lived on it. Once a child moved off of the property, it was to be returned to Roy Cunningham. (Transcript of Record, p. 23, ll. 3-10; p. 24, ll. 7-12; p. 28, ll. 8-17; Order of Judge Keesley; R. ____). It is important to note that the property was returned to Roy Cunningham at the some "price" he distributed it to Appellant Steve Cunningham and his other children at the time he divided it up between them. It is also important to note that when Steve Cunningham "swapped" lots with his sister, no money changed hands as part of this transaction.

The trial court ignored this testimony in reaching this finding of fact. Instead, the court relied solely on the testimony elicited from Steve Cunningham during his cross examination and concluded as a matter of law that this was a fraudulent conveyance. (Transcript of Record, p. 37, l. 15 – p. 42, l. 25; R. ____). The trial court's conclusion that Steve Cunningham gave conflicting reasons as to why the transfer back to his father occurred and that this made his entire testimony unreliable is not supported by the great weight of evidence presented at trial. In fact, Appellant Steve Cunningham testified and acknowledged that the fact his mother had died of cancer made correcting numerous errors contained in deeds and getting the property back to his father important. (Transcript of Record, p. 37, l. 15 – p. 43, l. 25; R. ____). And it should also be noted that neither of these explanations which Respondent's counsel argued before the Court and Judge Keesley cited as conflicting, have anything to do with the Respondent or her claim and lawsuit or judgment against Appellant Steve Cunningham or his business.

Respondent failed to establish that Appellant Steve Cunningham fraudulently transferred the property at issue in this case in order to defraud his creditors. Appellant presented clear and convincing testimony that this transfer was made pursuant to a longstanding family agreement and not to defraud creditors, including but not limited to Respondent. *Windsor Props., Inc., v. Dolphin Head Constr. Co.*, 331 S.C. 466, 498 S.E.2d 858 (1998); *Judy v. Judy*, 403 S.C. 203, 742 S.E.2d 672 (2013). The trial court's order to the contrary is clearly erroneous and not supported by the evidence presented at trial and should be reversed by this Court.

II. The Trial Court Erred in Ruling as a Matter of Law that the Transfer from Steve Cunningham to Mr. Roy Cunningham was Made Without Valuable Consideration.

While the trial court made a specific finding of fact that Appellant Steve Cunningham transferred the subject property to his father to defraud his creditors (including Respondent), this finding apparently played no part in the court's conclusions of law. (Order of Judge Keesley; R. ____). Instead, the court, citing the Court of Appeal's decision in *Albertson v. Robinson*, 371 S.C. 311, 638 S.E.2d 71 (S.C. App. 2006), held that a conveyance may be set aside "...under two conditions: first where the transfer is made by the grantor with the actual intent of defrauding his creditors where that intent is imputable to the grantee, even though there is a valuable consideration, and second, where a transfer is made without the actual intent to defraud the grantor's creditors, but without valuable consideration." (Order of Judge Keesley; R. ____). Judge Keesley then held and concluded as a matter of law that "in this matter I conclude that only the second condition is relevant, as the property was transferred without valuable consideration, the deed reciting only nominal consideration of \$1.00." (Order of Judge Keesley; R. ____).

Judge Keesley's ruling that the deed reciting the purchase price of a dollar constituted one made without valuable consideration as a matter of law misstates South Carolina law regarding fraudulent transfers and ignores the evidence presented to him at trial. *Albertson v. Robinson*, 371 S.C. 311, 638 S.E.2d 81 (S.C. App. 2006), is not controlling. The *Albertson* case is not applicable to the facts before this Court. Unlike *Albertson*, "love and affection" was not part of the deed from Steve Cunningham to his father Roy. (Plaintiff's Exhibit 3; R. ____). At issue in this case is whether the deed with nominal consideration of one dollar (\$1.00) is sufficient to set aside as a fraudulent

transaction. The court erroneously held that the fact that consideration was inadequate voided it under the Statute of Elizabeth as a matter of law. This is not the law of this state.

In *Royal Z Lanes, Inc. v. Collins Holding Corporation*, 337 S.C. 592, 524 S.E.2d 621 (1999) the South Carolina Supreme Court held that conveyances may be set aside as "fraudulent" under the Statute of Elizabeth if (1) it is voluntary (gratuitous) or there is an actual intent to defraud. The Court, held that a transfer for "grossly inadequate" consideration is not void on its face and will not be voided without an intent to defraud.

Citing prior case law, the Court held:

In *Jeffords v. Berry* 247 S.C. 347, 147 S.E.2d 415 (1966) we found that 'grossly inadequate' consideration is 'a strong badge of fraud' but we specifically rejected the argument that gross inadequacy of consideration reduces the conveyance to the status of one made without consideration, concluding 'gross inadequacy of consideration and without consideration are not synonymous in the law.' 147 S.E.2d at 418. Under *Jeffords* where there is gross inadequacy of consideration, an actual intent to defraud must still be shown to set aside the conveyance as fraudulent.

The Court concluded:

As noted above, grossly inadequate consideration is treated as a 'badge of fraud' under this Court's precedent (citations omitted)...a badge of fraud creates a rebuttable presumption of intent to defraud. *Dinkins v. Robbins*, 200 S.C. 475, 21 S.E. 2d 10 (1942); *James v. Martin*, 150 S.C. 75, 147 S.E. 752 (1929).

Appellants presented ample evidence to rebut any presumption of fraud arising out of the conveyance from Steve Cunningham to Roy Cunningham. Mr. Roy Cunningham informed his son that he wanted his property back because he wanted it to remain in the family. (Transcript of Record, p. 23, ll. 16 – p. 24, l. 1; R. ____). This request was part of the longstanding condition that he imposed on his children when he gave them the property originally and not part of any plan, effort, or scheme to defraud

any creditors. (Transcript of Record, p. 24, ll. 7-12; p. 28, ll. 8-17; R. ____). Respondent presented no evidence at the hearing before Judge Keesley that Mr. Roy Cunningham even knew of the lawsuit against his son or participated in any type of fraudulent scheme to defraud his son's creditors, including but not limited to Respondent.

Steve Cunningham deeded the property back to his father on December 25, 2010, when he realized it was still in his name. (Transcript of Record p. 37, ll. 20-22; p. 38, ll. 1-6; R. ____). He testified that he did so because of the agreement with his father made at the time of transfer of title to him. (Transcript of Record, p. 38, l. 6; R. ____). The property was re-conveyed at the same price that it was originally conveyed from Mr. Roy Cunningham to his children.

The trial court's order voiding this conveyance pursuant to the Statute of Elizabeth is clearly erroneous. It ignores and misapplies applicable South Carolina law as well as the evidence presented at trial. It should be reversed by this Court.

III. Respondent Failed to Establish the Grantor's Complicity in Any Scheme to Defraud Appellant's Creditors.

The South Carolina Court has held that even where it is shown that the grantor had a fraudulent intent to defraud his or her creditors, it must also be shown that the grantee participated in such a fraudulent act. *Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459 (2012); *McDaniel v. Allen*, 265 S.C. 237, 217 S.E.2d 773 (1975). Respondent failed to present any such evidence in this case.

Mr. Roy Cunningham informed his son that he wanted his property back because he wanted it to remain in the family. (Transcript of Record, p. 23, l. 16 – p. 24, l. 1; p. 36, ll. 14-18; R. ____). Mr. Roy Cunningham testified that this request was part of the longstanding condition that he imposed on his children when he gave them the property

originally and not part of any plan, effort, or scheme to defraud any creditors. (Transcript of Record, p. 24, ll. 7-12; p. 28, ll. 8-17; R. ____). Respondent presented no evidence at the hearing before Judge Keesley that Mr. Roy Cunningham even knew of the lawsuit against his son or participated in any type of fraudulent scheme to defraud his son's creditors, including but not limited to Respondent.

Steve Cunningham deeded the property back to his father on December 25, 2010, when he realized it was still in his name. (Transcript of Record p. 37, ll. 20-22; p. 38, ll. 1-6; R. ____). He testified that he did so because of the agreement with his father made at the time of transfer of title to him. (Transcript of Record, p. 38, l. 6; R. ____).

There was no evidence in trial that Roy Cunningham participated in any efforts to defraud Respondent or any other of his son's creditors. The trial court's order setting aside the transfer back to him is erroneous and should be reversed by this court.

IV. Respondent Presented No Evidence as to Appellant's Ability to Repay Her Judgment.

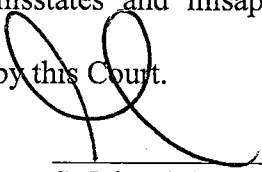
The Trial Court concluded as a matter of law that Appellant Steve Cunningham lacked the ability to repay Respondent's judgment against him. (Conclusion of Law Number 8; Order of Judge Keesley, R. ____). This finding is not supported by the evidence presented at trial and is clearly erroneous. Respondent presented testimony that her judgment has not been satisfied. She presented no evidence that Appellant Steve Cunningham lacked assets to repay her at the time of trial. She elicited no testimony from Appellant Steve Cunningham as to his financial status and/or his ability to pay.

The South Carolina Court has held that the focus of the Statute of Elizabeth is, "...on whether the grantor has reserved enough assets to satisfy his obligations, not at the

time of transfer but also at the time creditors are able to collect their indebtedness in full." *Windsor Properties, Inc. v. Dolphin Construction Company*, 331 S.C. 466, 498 S.E.2d 858 (1998). The Respondent presented no evidence as to Appellant Steve Cunningham's financial status at the time of trial. There was no evidence presented at trial as to the current status of Steve Cunningham's finances or his ability to pay off Respondent's judgment. Therefore, her efforts to set aside the conveyance from Steve Cunningham to Roy C. Cunningham under the Statute of Elizabeth fails as a matter of law and the Court's conclusion(s) of law to the contrary are clearly erroneous and should be overturned by this Court.

CONCLUSION

For the reasons set forth above, Judge Keesley's January 29, 2015 Order ignored the facts and evidence presented before him at trial. It is not supported by the evidence presented at trial. The Order also misstates and misapplies South Carolina Law. Appellants submit it should be reversed by this Court.



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Wilma Spikes Respondent,

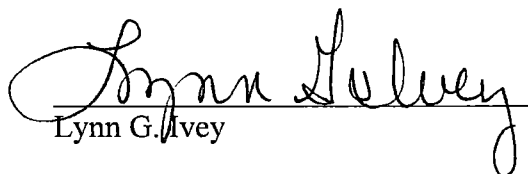
v.

Roy Steven Cunningham and Roy Chester Cunningham Appellants.

PROOF OF SERVICE

I, Lynn G. Ivey, an employee of Moore Taylor Law Firm, PA, certify that I have served Appellants' Initial Brief on counsel of record for Respondent in this action by depositing a copy of same in the United States Mail, postage prepaid, on May 28, 2015, addressed as follows:

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May 28, 2015

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